

**BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

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| In the Matter of the Petition for |) | |
| Reinstatement By: |) | |
| |) | |
| ROBERT KUTZNER |) | Case No. 27-2008-194697 |
| |) | |
| Physician's and Surgeon's |) | OAH No. 2009120128 |
| Certificate No. G-52483 |) | |
| |) | |
| Petitioner. |) | |
| _____ |) | |

DECISION

The attached Proposed Decision is hereby adopted as the Decision and Order of the Medical Board of California, Department of Consumer Affairs, State of California.

This Decision shall become effective at 5:00 p.m. on June 9, 2010.

IT IS SO ORDERED May 10, 2010.

MEDICAL BOARD OF CALIFORNIA

By: 
Hedy Chang, Chair
Panel B

**BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of the Petition for Reinstatement By:

ROBERT KUTZNER, M.D.,

Physician's and Surgeon's
Certificate No. G 52483

Petitioner.

Case No. 27-2008-194697

OAH No. 2009120128

PROPOSED DECISION

This matter, by assignment of the Medical Board of California pursuant to Business and Professions Code section 2307, was heard by Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, on March 24, 2010, in Los Angeles. The record was closed and the matter was submitted for decision at the conclusion of the hearing.

Robert Kutzner, M.D. (Petitioner), was represented by Fredrick M. Ray, Esq. Doug Knoll, Deputy Attorney General, appeared on behalf of the Attorney General of the State of California pursuant to Government Code section 11522.

FACTUAL FINDINGS

Petitioner's License History in California

1. On June 11, 1984, Petitioner was issued Physician's & Surgeon's Certificate No. G 52483 by the Medical Board of California (Board).
2. Effective February 21, 1996, the Board, by its Decision in Case No. 16-94-44482 (OAH No. L-9508202), revoked Petitioner's certificate. No cost award was ordered.
3. The discipline was based on the factual findings and legal conclusions that Respondent had violated Business and Professions Code sections 2305 and 2234,¹ by virtue of his having voluntarily surrendered his medical license to the Composite State Board of Medical Examiners for the State of Georgia (Georgia Board of Medical Examiners) in July of 1995 under circumstances in which he acknowledged the "surrender shall have the same effect as a revocation of the license."

¹ All further statutory references are to the Business and Professions Code.

Circumstances Underlying the Revocation of Petitioner's Certificate in California

4. Petitioner surrendered his Georgia medical license after the Georgia Board of Medical Examiners had filed charges against him alleging that he had a substance abuse problem, had been convicted in the State of California for contempt of court, failed to disclose required information about his criminal history on his application for his medical license in Georgia, and had an arrest warrant issued against him in the State of Indiana for domestic violence. Petitioner admits those allegations are true. The Georgia Board of Medical Examiners also made various allegations of misconduct against Petitioner with regard to a patient in whom he had implanted a pain pump who later died from a blood stream infection. Petitioner admits some of those allegations but denies others. Because Petitioner voluntarily surrendered his Georgia medical license, no findings on those allegations were ever made.

5. By the time that the Georgia Board of Medical Examiners took the above described action, Petitioner had already moved to California and was living with his then second wife. As a result of their mutual addiction to alcohol and drugs, Petitioner and his wife had a turbulent relationship. The Board took action on Petitioner's California certificate as a result of his having surrendered his Georgia medical license. His hearing in the Board matter was in December of 1995. After his California certificate was revoked in early 1996, as described above in Factual Finding number 2, Petitioner's life spiraled out of control. In March of 1996, Petitioner and his spouse got extremely intoxicated and became involved in a protracted argument, during which Petitioner ultimately pointed a pistol at his wife. He was later arrested on, prosecuted and pled nolo contendere to felony charges of domestic violence, making terrorist threats and committing a crime with a gun. Petitioner was sentenced to serve five years in state prison. He served a significant portion of his sentence and was released on parole in August of 2000.²

6. Petitioner's misconduct chronicled above was deeply rooted in his addiction to alcohol and drugs. His addictions in turn were manifestations of a difficult childhood, trauma sustained from honorable service during combat operations in the Viet Nam War (in which he was later diagnosed with post traumatic stress disorder [PTSD]), and his divorce from his first wife. Petitioner's addiction problems began to bloom in 1990 and increasingly worsened until he was finally put in jail after his arrest in March of 1996 stemming from his domestic dispute with his second wife.

Petitioner's Progress in Rehabilitation

7. The Petition for Reinstatement (petition) was filed with the Board on July 24, 2008.

² Petitioner's actions and conviction in California were not alleged in the case leading to the revocation of his California certificate.

8. Petitioner was a model prisoner and parolee. He devoted his time while incarcerated to programs and other rehabilitative efforts aimed at other prisoners, including playing a vital role in establishing a new rehabilitation program that was successful for years after he was released. Petitioner also received a commendation by prison staff for saving a fellow prisoner who was choking on a piece of food. Petitioner continued his good works and deeds while on parole and was recognized as a "parolee-of-the-year."

9. Petitioner has remained sober since he was arrested and put in jail in March of 1996 relative to his domestic dispute with his second wife. During his incarceration, he took advantage of counseling and therapies to help him better understand his addictions. He has closely followed the Alcoholics Anonymous program, including receiving tokens on the anniversaries of his sobriety. He also received therapy directed at his PTSD after he was released from parole. Petitioner is now a man of faith, who uses his spiritualism to buttress his sobriety.

10. Petitioner is now 58 years old. He has remarried. His two sons from his first marriage are now adults. Petitioner now works with one of his sons. Petitioner enjoys a stable family situation and a healthy relationship with his wife and children. He has tried to remain gainfully employed and support his family. At times it has been difficult, due to his criminal record and history of license discipline. Petitioner has tried to remain employed in the health care system. When those jobs ended, for reasons other than his performance, he took positions outside the health care system to earn income and support his family.

11. Petitioner has taken measures to improve himself. He diligently studied behavioral psychology and passed exams necessary to become a certified Domestic Violence Counselor and a Cognitive Behavior Therapist. He received a doctorate in Addiction Counseling. He studied computers and programming and is now certificated in those capacities, which he has used in some of his jobs. He has obtained a conditional stay agreement from the requisite federal authority allowing him to engage in phlebotomy in the federal health care system. He has also become certified to provide services to veterans.

12. Since approximately 2004, Petitioner has diligently studied continuing medical education (C.M.E.) materials covering a gamut of issues and topics. He has completed at least 50 hours of C.M.E. programs from Medscape. He has also self-studied medical papers, articles and journals so numerous as to take 28 pages to summarize. Those efforts demonstrate a sincere effort on Petitioner's part to reacclimate himself to the medical profession and catch up on the years of advances since he stopped practicing.

13. Petitioner has been extremely involved in community activities. His greatest efforts have been in serving military veterans. Petitioner has been extraordinarily active and productive in his efforts through the American Legion in Texas, having raised significant amounts of money for wounded veterans and their families.

14. The petition includes verified recommendations from two licensed physicians in the State of California, Francis M. Yamazaki and Alan Zaentz. Both physicians knew Petitioner when he was initially licensed in California and now support the reinstatement of his certificate.

15. Petitioner also presented character reference letters from various individuals who enthusiastically recommend his reinstatement and corroborate Petitioner's commitment toward maintaining his sobriety. The individuals who wrote letters on Petitioner's behalf include those who have knowledge of Petitioner's employment in the health care system since he was paroled from state prison, as well as his first wife. A number of other individuals familiar with Petitioner's situation before and after the revocation of his California certificate testified during the hearing of this matter and also corroborated Petitioner's recent good conduct and commitment to maintaining his sobriety. Those individuals included former in-laws, a prior employer, a colleague from the American Legion, and a California-licensed physician interested in practicing with Petitioner should his certificate be reinstated. Collectively, those individuals are familiar with Petitioner's situation before and after the revocation of his certificate.

16. No evidence was presented indicating that Petitioner has engaged in any misconduct since his parole from state prison in 2000.

17. Should his certificate be reinstated, Petitioner is interested in practicing wellness medicine, as well as serving wounded veterans. Petitioner appears to be passionate about those areas of medicine. The physician with whom he would like to practice, Dr. Fernando Rodas, has agreed to supervise Petitioner should his reinstated certificate be restricted. Due to his addictions, Petitioner has decided to avoid full-time anesthetic and/or pain management practices, which were his specialties during the events leading to his license discipline and convictions described above.

18. Petitioner has demonstrated a positive attitude about his situation, consistent with one who is dedicated to maintaining sobriety. In his petition and during the hearing, Petitioner candidly admitted his past misconduct and accepted responsibility for his failings.

LEGAL CONCLUSIONS

1. *Standard of Review.* The burden in this petition for reduction of administrative discipline rests with Petitioner. (*Flanzer v. Board of Dental Examiners* (1990) 220 Cal.App.3d 1392, 1398.) The standard of proof is clear and convincing evidence to a reasonable certainty. (*Hippard v. State Bar* (1989) 49 Cal.3d 1084.)

2A. *Disposition.* Cause was established pursuant to section 2307, and California Code of Regulations, title 16, section 1360.2, to reinstate Petitioner's revoked certificate. It has been well over 15 years since Petitioner committed the misconduct that led to the revocation of his certificate. He has established a significant track record of good conduct and activity demonstrating appreciable rehabilitation since 2000.

2B. Primary among those efforts have been exemplary behavior, extraordinary community service, diligence in continuing medical education and self-study, compelling efforts to reeducate and retrain himself in other disciplines, and developing a stable family life. But more significant has been Petitioner's efforts to achieve and maintain his sobriety. By his actions leading up to the hearing of this matter, and by his demeanor during the hearing, Petitioner has established a record of rehabilitation consistent with one who has accepted his responsibility for his downfall, identified the reasons it occurred, evaluated his life and made appropriate changes, and demonstrated that he is ready for a second chance to practice medicine. (Factual Findings 1-18.)

3. *Terms and Conditions.* Cause was established pursuant to section 2307, subdivision (f), to impose terms and conditions upon the reinstatement of Petitioner's certificate, including a lengthy probation and terms aimed at corroborating Petitioner's continuing sobriety. In addition, Petitioner should successfully complete the Physician Assessment and Clinical Education (PACE) program, to insure he has retained his technical proficiency to practice medicine. These terms and conditions are warranted due to Petitioner's past addiction problem, as well as the length of time that Petitioner has not practiced medicine. (Factual Findings 1-18.)

ORDER

The petition of Robert Kutzner, M.D., for reinstatement of his certificate is granted. Petitioner's certificate shall be reinstated. However, the certificate shall be immediately revoked, the order of revocation stayed and Petitioner placed on probation for a period of five years on the terms and conditions listed below.

1. Controlled Substances- Maintain Records and Access to Records and Inventories

Petitioner shall maintain a record of all controlled substances ordered, prescribed, dispensed, administered, or possessed by Petitioner, and any recommendation or approval which enables a patient or patient's primary caregiver to possess or cultivate marijuana for the personal medical purposes of the patient within the meaning of Health and Safety Code section 11362.5, during probation, showing all the following: 1) the name and address of patient; 2) the date; 3) the character and quantity of controlled substances involved; and 4) the indications and diagnosis for which the controlled substances were furnished.

Petitioner shall keep these records in a separate file or ledger, in chronological order. All records and any inventories of controlled substances shall be available for immediate inspection and copying on the premises by the Board or its designee at all times during business hours and shall be retained for the entire term of probation.

Failure to maintain all records, to provide immediate access to the inventory, or to make all records available for immediate inspection and copying on the premises, is a violation of probation.

2. Controlled Substances - Abstain From Use

Petitioner shall abstain completely from the personal use or possession of controlled substances as defined in the California Uniform Controlled Substances Act, dangerous drugs as defined by Business and Professions Code section 4022, and any drugs requiring a prescription. This prohibition does not apply to medications lawfully prescribed to Petitioner by another practitioner for a bona fide illness or condition.

Within 15 calendar days of receiving any lawful prescription medications, Petitioner shall notify the Board or its designee of the: issuing practitioner's name, address, and telephone number; medication name and strength; and issuing pharmacy name, address, and telephone number.

3. Alcohol - Abstain From Use

Petitioner shall abstain completely from the use of products or beverages containing alcohol.

4. Biological Fluid Testing

Petitioner shall immediately submit to biological fluid testing, at Petitioner's expense, upon request of the Board or its designee. Prior to practicing medicine, Petitioner shall, at Petitioner's expense, contract with a laboratory or service - approved in advance by the Board or its designee - that will conduct random, unannounced, observed, urine testing a minimum of four times each month. The contract shall require results of the urine tests to be transmitted by the laboratory or service directly to the Board or its designee within four hours of the results becoming available. Failure to maintain this laboratory or service during the period of probation is a violation of probation. A certified copy of any laboratory test result may be received in evidence in any proceedings between the Board and Petitioner. Failure to submit to or comply with the time frame for submitting to, or failure to complete the required biological fluid testing, is a violation of probation.

5. Clinical Training Program

Within 60 calendar days of the effective date of this Decision, Petitioner shall enroll in a clinical training or educational program equivalent to the Physician Assessment and Clinical Education Program (PACE) offered at the University of California - San Diego School of Medicine (Program).

The Program shall consist of a Comprehensive Assessment program comprised of a two-day assessment of Petitioner's physical and mental health; basic clinical and communication skills common to all clinicians; medical knowledge, skill and judgment pertaining to Petitioner's specialty or sub-specialty; and at minimum, a 40-hour program of clinical education in the area of practice in which Petitioner was alleged to be deficient and which takes into account data obtained from the assessment, Decision(s), Accusation(s), and any other information that the Board or its designee deems relevant. Petitioner shall pay all expenses associated with the clinical training program.

Based on Petitioner's performance and test results in the assessment and clinical education, the Program will advise the Board or its designee of its recommendation(s) for the scope and length of any additional educational or clinical training, treatment for any medical condition, treatment for any psychological condition, or anything else affecting Petitioner's practice of medicine. Petitioner shall comply with Program recommendations.

At the completion of any additional educational or clinical training, Petitioner shall submit to and pass an examination. The Program's determination whether or not Petitioner passed the examination or successfully completed the Program shall be binding.

Petitioner shall complete the Program not later than six months after Petitioner's initial enrollment unless the Board or its designee agrees in writing to a later time for completion.

Failure to participate in and complete successfully all phases of the clinical training program outlined above is a violation of probation.

Petitioner shall not practice medicine until Petitioner has successfully completed the Program and has been so notified by the Board or its designee in writing, except that Petitioner may practice in a clinical training program approved by the Board or its designee. Petitioner's practice of medicine shall be restricted only to that which is required by the approved training program.

6. Psychiatric Evaluation

Within 30 calendar days of the effective date of this Decision, and on a whatever periodic basis thereafter as may be required by the Board or its designee, Petitioner shall undergo and complete a psychiatric evaluation (and psychological testing, if deemed necessary) by a Board-appointed board-certified psychiatrist, who shall consider any information provided by the Board or designee and any other information the psychiatrist deems relevant, and shall furnish a written evaluation report to the Board or its designee. Psychiatric evaluations conducted prior to the effective date of the Decision shall not be accepted towards the fulfillment of this requirement. Petitioner shall pay the cost of all psychiatric evaluations and psychological testing.

Petitioner shall comply with all restrictions or conditions recommended by the evaluating psychiatrist within 15 calendar days after being notified by the Board or its designee.

Failure to undergo and complete a psychiatric evaluation and psychological testing, or comply with the required additional conditions or restrictions, is a violation of probation.

7. Psychotherapy

Within 60 calendar days of the effective date of this Decision, Petitioner shall submit to the Board or its designee for prior approval the name and qualifications of a board certified psychiatrist or a licensed psychologist who has a doctoral degree in psychology and at least five years of postgraduate experience in the diagnosis and treatment of emotional and mental disorders. Upon approval, Petitioner shall undergo and continue psychotherapy treatment, including any modifications to the frequency of psychotherapy, until the Board or its designee deems that no further psychotherapy is necessary.

The psychotherapist shall consider any information provided by the Board or its designee and any other information the psychotherapist deems relevant and shall furnish a written evaluation report to the Board or its designee. Petitioner shall cooperate in providing the psychotherapist any information and documents that the psychotherapist may deem pertinent.

Petitioner shall have the treating psychotherapist submit quarterly status reports to the Board or its designee. The Board or its designee may require Petitioner to undergo psychiatric evaluations by a Board-appointed board-certified psychiatrist. If, prior to the completion of probation, Petitioner is found to be mentally unfit to resume the practice of medicine without restrictions, the Board shall retain continuing jurisdiction over Petitioner's license and the period of probation shall be extended until the Board determines that Petitioner is mentally fit to resume the practice of medicine without restrictions.

Petitioner shall pay the cost of all psychotherapy and psychiatric evaluations. Failure to undergo and continue psychotherapy treatment, or comply with any required modification in the frequency of psychotherapy, is a violation of probation.

8. Solo Practice

Petitioner is prohibited from engaging in the solo practice of medicine.

9. Notification

Prior to engaging in the practice of medicine the Petitioner shall provide a true copy of the Decision to the Chief of Staff or the Chief Executive Officer at every hospital where privileges or membership are extended to Petitioner, at any other facility where

Petitioner engages in the practice of medicine, including all physician and locum tenens registries or other similar agencies, and to the Chief Executive Officer at every insurance carrier which extends malpractice insurance coverage to Petitioner. Petitioner shall submit proof of compliance to the Division or its designee within 15 calendar days. This condition shall apply to any change(s) in hospitals, other facilities or insurance carrier.

10. Supervision of Physician Assistants

During probation, Petitioner is prohibited from supervising physician assistants.

11. Obey All Laws

Petitioner shall obey all federal, state and local laws, all rules governing the practice of medicine in California and remain in full compliance with any court ordered criminal probation, payments, and other orders.

12. Quarterly Declarations

Petitioner shall submit quarterly declarations under penalty of perjury on forms provided by the Division, stating whether there has been compliance with all the conditions of probation. Petitioner shall submit quarterly declarations not later than 10 calendar days after the end of the preceding quarter.

13. Probation Unit Compliance

Petitioner shall comply with the Division's probation unit. Petitioner shall, at all times, keep the Division informed of Petitioner's business and residence addresses. Changes of such addresses shall be immediately communicated in writing to the Division or its designee. Under no circumstances shall a post office box serve as an address of record, except as allowed by Business and Professions Code section 2021(b). Petitioner shall not engage in the practice of medicine in Petitioner's place of residence. Petitioner shall maintain a current and renewed California physician's and surgeon's license.

Petitioner shall immediately inform the Division or its designee, in writing, of travel to any areas outside the jurisdiction of California which lasts, or is contemplated to last, more than thirty (30) calendar days.

14. Interview with the Division or its Designee

Petitioner shall be available in person for interviews either at Petitioner's place of business or at the probation unit office, with the Division or its designee upon request at various intervals and either with or without prior notice throughout the term of probation.

15. Residing or Practicing Out-of-State

In the event Petitioner should leave the State of California to reside or to practice Petitioner shall notify the Division or its designee in writing 30 calendar days prior to the dates of departure and return. Non-practice is defined as any period of time exceeding thirty calendar days in which Petitioner is not engaging in any activities defined in sections 2051 and 2052 of the Business and Professions Code.

All time spent in an intensive training program outside the State of California which has been approved by the Division or its designee shall be considered as time spent in the practice of medicine within the State. A Board-ordered suspension of practice shall not be considered as a period of non-practice. Periods of temporary or permanent residence or practice outside California will not apply to the reduction of the probationary term. Periods of temporary or permanent residence or practice outside California will relieve Petitioner of the responsibility to comply with the probationary terms and conditions with the exception of this condition and the following terms and conditions of probation: Obey All Laws; Probation Unit Compliance; and Cost Recovery.

Petitioner's license shall be automatically cancelled if Petitioner's periods of temporary or permanent residence or practice outside California totals two years. However, Petitioner's license shall not be cancelled as long as Petitioner is residing and practicing medicine in another state of the United States and is on active probation with the medical licensing authority of that state, in which case the two year period shall begin on the date probation is completed or terminated in that state.

16. Failure to Practice Medicine - California Resident

In the event Petitioner resides in the State of California and for any reason Petitioner stops practicing medicine in California, Petitioner shall notify the Division or its designee in writing within 30 calendar days prior to the dates of non-practice and return to practice. Any period of non-practice within California, as defined in this condition, will not apply to the reduction of the probationary term and does not relieve Petitioner of the responsibility to comply with the terms and conditions of probation. Non-practice is defined as any period of time exceeding thirty calendar days in which Petitioner is not engaging in any activities defined in sections 2051 and 2052 of the Business and Professions Code.

All time spent in an intensive training program which has been approved by the Division or its designee shall be considered time spent in the practice of medicine. For purposes of this condition, non-practice due to a Board-ordered suspension or in compliance with any other condition of probation, shall not be considered a period of non-practice.

Petitioner's license shall be automatically cancelled if Petitioner resides in California and for a total of two years, fails to engage in California in any of the activities described in Business and Professions Code sections 2051 and 2052.

17. Completion of Probation

Petitioner shall comply with all financial obligations, including probation costs, not later than 120 calendar days prior to the completion of probation. Upon successful completion of probation, Petitioner's certificate shall be fully restored.

18. Violation of Probation

Failure to fully comply with any term or condition of probation is a violation of probation. If Petitioner violates probation in any respect, the Division, after giving Petitioner notice and the opportunity to be heard, may seek to revoke Petitioner's certificate or any other disciplinary order permitted by the Medical Practice Act. If an Accusation, or Petition to Revoke Probation, or an Interim Suspension Order is filed against Petitioner during probation, the Division shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.

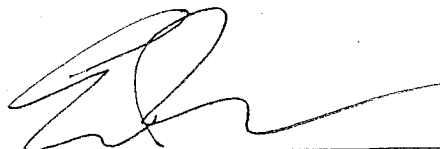
19. License Surrender

Following the effective date of this Decision, if Petitioner ceases practicing due to retirement, health reasons or is otherwise unable to satisfy the terms and conditions of probation, Petitioner may request the voluntary surrender of Petitioner's license. The Division reserves the right to evaluate Petitioner's request and to exercise its discretion whether or not to grant the request, or to take any other action deemed appropriate and reasonable under the circumstances. Upon formal acceptance of the surrender, Petitioner shall within 15 calendar days deliver Petitioner's wallet and wall certificate to the Division or its designee and Petitioner shall no longer practice medicine. Petitioner will no longer be subject to the terms and conditions of probation and the surrender of Petitioner's license shall be deemed disciplinary action. If Petitioner thereafter re-applies for a medical license, the application shall be treated as a petition for reinstatement of a revoked certificate.

20. Probation Monitoring Costs

Petitioner shall pay the costs associated with probation monitoring each and every year of probation, as designated by the Division, which may be adjusted on an annual basis. Such costs shall be payable to the Medical Board of California and delivered to the Division or its designee no later than January 31 of each calendar year. Failure to pay costs within 30 calendar days of the due date is a violation of probation.

Dated: April 7, 2010



ERIC SAWYER
Administrative Law Judge
Office of Administrative Hearings